

IN THE MATTER OF

KATHLEEN SWANN of Saskatoon, Saskatchewan, (Complainant) and

UNIVERSITY OF SASKATCHEWAN of Saskatoon, Saskatchewan, (Respondent)

DECISION

1. introduction

1. Ms. Kathleen Swann, the Complainant, launched a complaint with the Saskatchewan Human Rights Commission against the University of Saskatchewan, the Respondent. Ms. Swann is employed as a Clerk Steno II with the Respondent. She alleged that she has been discriminated against in that the Respondent's wage scale is gender-based and discriminatory contrary to The Saskatchewan Human Rights Code, S.S. 1979, c.S-24.1.

2. The Complaint was dismissed by the Chief Commissioner of the Saskatchewan Human Rights Commission on March 9 2005. The Complainant has requested a review by the Saskatchewan Human Rights Tribunal.

3. The Complainant's Complaint is one of 6 similar complaints launched against the University of Saskatchewan. The Complainant did not file her complaint as a class complaint pursuant to Section 4 of the Code Regulations.

2. ANALYSIS

4. The Complainant alleges that she is employed in a female-dominated position as a Clerk Steno II with a remuneration of \$16.62 per hour. She alleges that the Respondent pays male-dominated positions greater remuneration for work of equal value. The comparison she offers is a Community Peace Officer II who is paid \$21.18 per hour and a Boiler Operator – Third Class who is paid \$20.49 per hour. In this fashion she alleges the Respondent discriminated against her. There is nothing further in the Complaint Form that identifies the duties performed by a Clerk Steno II, a Community Peace Officer II and a Boiler Operator – Third Class.

5. The Saskatchewan Human Rights Tribunal is empowered to review the Chief Commissioner's dismissal of a complaint pursuant to Section 29.4(1) of The Saskatchewan Human Rights Code. The Code does not provide guidance to the Tribunal as to the appropriate standard of review of the Chief Commissioner's decision. Ultimately, the Tribunals preferred the reasonableness simpliciter standard of review which was initially articulated by Mr. Anil Pandila, Q.C., in *David Criss against the Government of Saskatchewan, Department of Justice, Corrections Branch, S.H.R.T.*, July 30, 2003 and implicitly ratified by Mr. Justice Foley of the Court of Queen's Bench in Saskatoon in *Saskatoon Regional Health Authority v. Kahsai*, (2004) 250 Sask. R. 116. (Q.B.)

6. Therefore the question before the Tribunal is whether the Chief Commissioner's dismissal was reasonable.

7. The Chief Commissioner of the Saskatchewan Human Rights Commission noted various irregularities in the Complaint Form signed by the Complainant. However, the Chief Commissioner did not dismiss the Complaint on that basis and considered the Complaint on its merits.

8. In considering the Complaint, the Chief Commissioner presumed that the Commission was asked to “examine all of the various positions available in the Respondent’s employment” and “to reach a conclusion that positions dominated by men” commanded higher rates of pay. Although Section 16 of the Code was not referred to in the Complaint Form, the Chief Commissioner considered the Complaint under Section 16 which states that employers cannot discriminate against their employees based on prohibited grounds. Complaints of this nature are referred to as pay equity complaints.

9. The relevant sub-sections state as follows:

16(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any terms of employment, on the basis of a prohibited ground.

16(2) No employee shall discriminate against another employee on the basis of a prohibited ground.

10. The definition of prohibited ground in Section 2(1)(m.01)(v) includes “sex” which is further defined as “gender” in Section 2(1)(o) of the Code.

11. It is trite to acknowledge that discrimination occurs where men and women perform the same employment duties and are paid differently.

12. The circumstances of the Complaint are rather unique. The Commission candidly acknowledges that an investigation was not conducted. Usually a review by a Tribunal involves a file review of the investigator’s materials, documents, witness statements as well as statements of the complainant and respondent. In the Complainant’s case, the Saskatchewan Human Rights Commission file consists only of the reasons for the dismissal.

13. Two themes are noted in my review of the Chief Commissioner’s reasons for dismissal. The first theme is that a complaint regarding pay equity must involve the comparison of similar jobs. The second theme is that the Commission is not mandated to determine a pay equity complaint because the Code offers no scheme to evaluate the positions when positions are not comparable.

14. As noted in the Chief Commissioner’s dismissal, the Commission previously examined two job positions which appeared to be dissimilar based on their job titles of “food cashier” and “food clerk”. The Commission examined each employees’ proximity to product and customers as well as responsibilities and working conditions. Based on these factors, the Commission was able to compare, what initially appeared to be, different jobs. Once the two jobs were evaluated on these objective factors, certain similarities were found to exist between food cashiers and food clerks. After this assessment, the Commission opined that the wage difference between these positions was based on gender rather than any objective factors.

15. The object of Section 16 of the Code is to prevent discrimination in the workplace. Such discrimination would arise where men and women are not paid equally for work of equal value. Nowhere in the Code does it say that men and women must have the same title or perform exactly the same type of work before a comparison can be made.

16. On their face, the job titles of Clerk Steno II, a Community Peace Officer II and a Boiler Operator – Third Class certainly connote different skills. However, the job titles tell nothing about the actual job duties. The titles reveal nothing about the hours of work or whether the positions are full time/part-time or seasonal. There is no information on academic qualifications or requisite experience.

17. One makes certain assumptions that the positions must be disparate. However, there may be skills of Clerk Steno II that are similar to the skills of a Community Peace Officer II. It may be that both positions require some data entry functions and interactions with members of the public. However, I offer this as only one example of potential similarity as there are no facts upon which to adjudicate these positions.

18. It was seldom that jobs typically held by one gender were described by the same title as similar jobs held by another gender. Men were called janitors and women were called housekeepers although at a fundamental level the job duties were similar.

19. It was presumed by the Chief Commissioner that the Commission was asked to examine all the Respondent's positions. This was not so. The Complaint Form identified the comparable job positions of a Community Peace Officer II and a Boiler Operator – Third Class. The Complainant did not request a wholesale review of all the Respondent's positions.

20. The assumption that the jobs were dissimilar was based solely on the job titles without any investigation as to the accuracy of these assumptions. These assumptions support job stereotypes as opposed to any functional difference between the jobs. As there was no investigation I cannot determine whether it was reasonable to assume that these positions were so dissimilar that a comparison could not be made. Without an investigation which evaluates objective factors of these positions one cannot determine if the work performed by the Complainant is undervalued and underpaid when compared to the male-dominated positions.

21. Very recently the Supreme Court of Canada has cautioned that narrow interpretations may "sterilize" human rights law with the effect of defeating their very purpose. [Canada (Human Rights Commission) v. Canadian Airlines International Ltd., 2006 SCC 1 (CanLII)] In the Complainant's case, a narrow interpretation of the Code would effectively preclude an assessment of whether she is paid less for work of equal value based on nothing more than a job title.

22. The second theme of the Chief Commissioner's dismissal is that the Code has no defined legislative scheme to determine job equivalency. While that is true, assistance can be found in the Canadian Human Rights Act, R.S. 1985, c.H-6, Section 11(2):

In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed. [Emphasis mine]

23. The Equal Wages Guidelines, 1986, SCR/86-1082 also identifies the same criteria for evaluating jobs – skill, effort, responsibility and working conditions (see Section 3-8). Each of the identified criterion is further broken down to provide guidance in job evaluations. For example, "skill" refers to intellectual and physical qualifications arising from experience, training, education or natural ability.

24. The goal of a job evaluation is to ensure that systemic discrimination experienced by women is hopefully eliminated. As noted by the Pay Equity Taskforce – Final Report 2004, the closer the job duties approximate those functions carried out in the home for free, the less value ascribed to those job positions.

25. The fact that the Code does not identify a scheme of job evaluation does not persuade me that the Commission has no mandate to act. Certainly the Commission is entitled to determine its mandate without involvement of a Tribunal. However, the Saskatchewan Human Rights Commission has not historically been constrained as it has successfully argued beyond the strict

literal interpretation of various sections of the Code. This approach is in keeping with the broad objectives stated in Section 3:

(a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and

(b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

26. In *Canada (Attorney General) v. Mossop* [1993] 1 S.C.R. 554, the Honourable Madam Justice L'Heureux-Dubé directed adjudicators to adopt a "living tree" approach to interpretation of human rights legislation.

Even if Parliament had in mind a specific idea of the scope of "family status", in the absence of a definition in the Act which embodies this scope, concepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time. These codes leave ample scope for interpretation by those charged with that task. The "living-tree" doctrine, well understood and accepted as a principle of constitutional interpretation, is particularly well suited to human rights legislation. The enumerated grounds of discrimination must be examined in the context of contemporary values, and not in a vacuum ... the meaning of the enumerated grounds ... is not "frozen in time" and the scope of each ground may evolve.

27. Human rights legislation has the status of "fundamental law" and must be interpreted liberally to fulfill its objectives. (*Ontario Human Rights Commission et al v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 236; *The British Columbia Government and Service Employees Union v. The Government of the Province of British Columbia et al*, [1999] 3 S.C.R. 3) The suggestion that without a prescribed scheme, the Human Rights Commission cannot consider the Complainant's allegations does not embrace the liberal interpretation the Supreme Court suggests a tribunal bring to the interpretation of human rights legislation.

28. The interpretation of human rights legislation is a dynamic undertaking which reflects the challenges to our previously accepted social norms. The Courts have been vigorous in their protection of human rights and, in doing so, have expanded the protections beyond the literal interpretations of human rights legislation.

29. For example, the Supreme Court of Canada in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 expanded the definition of sex discrimination to include pregnancy. In *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, the Court accepted that sexual harassment was a form of sexual discrimination. Both of the cases found that discrimination on the basis of sex was more than the literal interpretation found in the governing legislation.

30. I do not view the failure of the Code to prescribe a scheme of job evaluation to be fatal to the Complainant's claim. I consider that a more expansive interpretation should be taken of the Code.

31. Accordingly, I find the decision of the Chief Commissioner to dismiss the Complaint was not reasonable given that an investigation did not occur to test the assumptions of the duties associated with the position. Furthermore, the failure of the Code to prescribe a scheme of job evaluation does not preclude a finding that the Complainant has a valid complaint.

3. SUMMARY

32. I therefore order that this matter be referred to an Inquiry under Section 29.4(4) of the Saskatchewan Human Rights Code.

DATED at Saskatoon, Saskatchewan, this 12th day of July, 2006.

“Karen M. Prisciak, Q.C.”

Karen M. Prisciak, Q.C.,

Saskatchewan Human Rights Tribunal